

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Lydia Obasi	Team: Team # 4	CCRB Case #: 200500177	<input checked="" type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Friday, 12/31/2004 12:30 PM	Location of Incident: § 87(2)(b) Manhattan	Precinct: 34	18 Mo. SOL 6/30/2006	EO SOL 6/30/2006	
Date/Time CV Reported Tue, 01/04/2005 5:08 AM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Thu, 01/06/2005 12:54 PM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Witness(es)	Home Address
§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Harvin Hart	00829	924670	034 PCT
2. POM Fabio Nunez	01432	925839	034 PCT
3. SGT Juan Hernandez	03610	902705	034 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Cliff Nieves	10250	933097	034 PCT

Officer(s)	Allegation	Investigator Recommendation
A.SGT Juan Hernandez	Abuse: Sgt Juan Hernandez authorized the stop and question of § 87(2)(b) and § 87(2)(b)	§ 87(2)(b)
B.POM Harvin Hart	Force: PO Harvin Hart used physical force against § 87(2)(b)	§ 87(2)(b)
C.POM Fabio Nunez	Force: PO Fabio Nunez used physical force against § 87(2)(b)	§ 87(2)(b)

Synopsis

On December 31, 2004, at 12:30 PM, in front of § 87(2)(b) in Manhattan, Sgt. Juan Hernandez of the 34th Precinct authorized the stop and question of complainant/victim § 87(2)(b) (allegation A). During the stop, Officers Harvin Hart and Fabio Nunez used physical force to effect § 87(2)(b)'s arrest (allegations B and C). The officers transported § 87(2)(b) to the 34th Precinct stationhouse without further incident. § 87(2)(b) was arrested for § 87(2)(b) § 87(2)(b) stated that he did not sustain any injuries as a result of this incident.

According to Internal Affairs Bureau (IAB) Log Synopsis Report #05-00240, the complaint was referred to the 34th Precinct and the CCRB. The 34th Precinct's brief investigation found that Officers Hart and Nunez did not use excessive force against § 87(2)(b) and recommended that the allegations be closed as Unsubstantiated.

§ 87(2)(g)

Summary of Complaint

On January 19, 2005 § 87(2)(b) § 87(2)(b) was interviewed at the CCRB (See enclosure #9A-C). According to § 87(2)(b) on December 31, 2004, at 12:30 PM, he visited his friend § 87(2)(b) at § 87(2)(b) in Manhattan to retrieve musical compact discs. While standing at the building's front entrance and using the intercom to call § 87(2)(b) he observed three uniformed officers, (identified by this investigation as) Sgt. Juan Hernandez and Officers Harvin Hart and Fabio Nunez, pull up to the curb in front of the building. PO Hart spoke to § 87(2)(b) through the open passenger door window and asked, "Do you live here and do you have identification." § 87(2)(b) responded, "I don't live here and I don't have identification." As PO Hart and the other two officers exited their vehicle, PO Hart instructed § 87(2)(b) to move away from the entrance of the building. According to § 87(2)(b) as he complied with the officer's instructions, he responded, "I'll move, but I'm waiting for a friend." § 87(2)(b) stated that as he moved from the entrance to the curb, PO Hart approached him and asked several times, "Have you ever been slapped before?" § 87(2)(b) responded, "Go ahead and slap me. If you slap me, I'll call Internal Affairs." § 87(2)(b) added that a crowd had gathered.

At this point, PO Hart grabbed § 87(2)(b)'s jacket at the chest, lifted him off the ground, and carried him from the curb to the wall of the building, approximately two car lengths away. PO Hart then pushed § 87(2)(b) face-first against the wall and frisked him. The frisk revealed no weapons. As PO Hart frisked him, § 87(2)(b) admitted to cursing at the officers calling them, "Fucking assholes." Sgt. Hernandez told § 87(2)(b) to calm down. PO Hart then handcuffed § 87(2)(b) and escorted him to the police car, but he continued to turn his body around as the officer attempted to place him inside the vehicle. PO Hart held § 87(2)(b) by the arms and pushed him inside the vehicle as PO Nunez kicked his left knee "lightly" three times, trying to get his leg inside the vehicle. § 87(2)(b) was transported to the 34th Precinct stationhouse without further incident. § 87(2)(b) stated that he was charged with § 87(2)(b)

§ 87(2)(b) § 87(2)(b) admitted that he was "snotty" to the officers during the incident. § 87(2)(b) stated that he did not sustain any injuries. § 87(2)(b) § 87(2)(b) and his friend, § 87(2)(b) were present.

Results of Investigation

Witness Statement

§ 87(2)(b)

On April 1, 2005, § 87(2)(b) was interviewed by the CCRB. During the incident, § 87(2)(b) stated that he was sitting in the living room of his apartment when he heard the screeching sound of a vehicle's tires. From the living room window, which overlooks § 87(2)(b), § 87(2)(b) observed his friend of more than ten years, § 87(2)(b) and his other friend § 87(2)(b) standing on the sidewalk in front of the main entrance of the building. Sgt. Hernandez and Officers Hart and Nunez, identified during this investigation, exited an unmarked vehicle and approached the two. § 87(2)(b) stated that he heard PO Hart ask § 87(2)(b) and § 87(2)(b) for their identification. § 87(2)(b) presented the officer with his identification and then entered the building and returned to his § 87(2)(b) floor apartment. However, § 87(2)(b) told PO Hart that he did not have his identification and told the officer that he would move from the front of the building. § 87(2)(b) observed that § 87(2)(b) walked from the front entrance of the building to the curb, but the three officers approached him and surrounded him. According to § 87(2)(b) he heard PO Hart tell § 87(2)(b) "You were fresh. Do you want to be slapped?" § 87(2)(b) responded, "Go ahead and slap me and see what happens." According to § 87(2)(b) PO Hart used two hands and grabbed § 87(2)(b)'s shirt from the chest area and pulled § 87(2)(b) to the right side of the building's front door and pushed him against the wall. § 87(2)(b) then observed that PO Hart and PO Nunez searched § 87(2)(b) by placing their hands inside his pants pockets. According to § 87(2)(b) § 87(2)(b) was not resisting, but the officers deliberately grabbed § 87(2)(b)'s arms and flailed them to "make it seem that § 87(2)(b) was resisting." According to § 87(2)(b) a crowd had gathered and within seconds, he went downstairs in attempt to talk with the officers and ensure that § 87(2)(b) would not be arrested. However, as § 87(2)(b) left the building, PO Hart had handcuffed § 87(2)(b) and escorted him to the police vehicle. § 87(2)(b) did not observe § 87(2)(b) at the scene or in the hallway of the building. § 87(2)(b) described § 87(2)(b) as resisting and "not wanting to enter the vehicle." § 87(2)(b) observed that PO Nunez kned § 87(2)(b) against his ribs and elbowed him against his body as PO Hart placed him inside the police car. The officers left the scene without further incident. § 87(2)(b) added that § 87(2)(b)'s girlfriend resides with him and § 87(2)(b) was visiting the building to meet with her. § 87(2)(b) admitted that he and § 87(2)(b) discussed the incident. (See enclosure #10A-D)

§ 87(2)(b)

§ 87(2)(b) was interviewed at the CCRB on April 12, 2005. § 87(2)(b) states that during the incident, he was returning home from the grocery store when he observed § 87(2)(b) standing in front of § 87(2)(b). According to § 87(2)(b) the two are acquaintances and as they conversed, § 87(2)(b) learned that § 87(2)(b) was waiting for another acquaintance, § 87(2)(b) to exit the building and give him compact discs. § 87(2)(b) stated that the two conversed for three to five minutes when an unmarked sedan parked in front of them. According to § 87(2)(b) as he and § 87(2)(b) stood in the middle of the sidewalk in front of the main entrance, PO Nunez asked them whether they resided in the building. § 87(2)(b) responded in the affirmative, but § 87(2)(b) responded in the negative. PO Nunez then requested § 87(2)(b)'s identification and he complied by providing the officer his NYS driver's permit card and his work identification. However, § 87(2)(b) stated that he did not have identification. According to § 87(2)(b) as he spoke with PO Nunez, he did not observe the interaction between § 87(2)(b) and PO Hart. PO Nunez then instructed § 87(2)(b) to go home and he complied. As § 87(2)(b) turned to walk towards the entrance of his building, he observed that PO Hart, using two hands, grabbed § 87(2)(b)'s jacket and pushed him against the wall of the building. § 87(2)(b) added that as he opened the first set of doors of the main entrance, he heard PO Hart say, "Do you know what it's like to be slapped?" § 87(2)(b) stated that he entered the second set of doors and did not observe the officer and § 87(2)(b). As he walked towards his apartment, he observed § 87(2)(b) walking downstairs and informed him that § 87(2)(b) was with the police. § 87(2)(b) did not observe any officer punch, kick, knee or use their elbows against § 87(2)(b). § 87(2)(b) did not observe any officer frisk or search § 87(2)(b). § 87(2)(b) stated that he did not hear § 87(2)(b) yell, curse or resist the officers. (See enclosure #11A-C)

Officer's Statements

During the incident, Sgt. Juan Hernandez was assigned as the supervisor of the 34th Precinct's Burglary Apprehension Team with Officers Harvin Hart and Fabio Nunez. PO Hart was identified by his nameplate and in his CCRB statement, the officer identified Sgt. Hernandez and PO Nunez. In their CCRB statements, the three officers confirmed their presence.

PO Harvin Hart

PO Hart was interviewed at the CCRB on February 11, 2005. His memo book entry indicates, "At 12:29 PM, one under from § 87(2)(b) [REDACTED]"

According to PO Hart, during the incident, his team was conducting building inspections. PO Hart observed § 87(2)(b) [REDACTED] and § 87(2)(b) [REDACTED] standing in front of the entrance of § 87(2)(b) [REDACTED] in Manhattan. PO Hart observed that a lady attempted to enter the building, but the two males blocked her path and did not immediately move. The two males eventually moved and the lady entered the building. The three officers exited their vehicle and approached the two males. PO Hart asked what they were doing in front of the building. According to PO Hart, § 87(2)(b) [REDACTED] responded, "We're waiting for a friend." PO Hart asked that § 87(2)(b) [REDACTED] and § 87(2)(b) [REDACTED] move from the entrance, and § 87(2)(b) [REDACTED] complied, but § 87(2)(b) [REDACTED] remained. PO Hart then asked § 87(2)(b) [REDACTED] whether he heard his request and again asked him to move, but § 87(2)(b) [REDACTED] asked, "Why?" According to PO Hart, he explained that § 87(2)(b) [REDACTED] was blocking pedestrian traffic and again asked him if he resided at the building. § 87(2)(b) [REDACTED] responded in the positive and PO Hart requested his identification. § 87(2)(b) [REDACTED] responded, "I don't have to show you anything." PO Hart then told § 87(2)(b) [REDACTED] that he would receive a summons, but § 87(2)(b) [REDACTED] screamed, "This ain't Cuba." At this point, Sgt. Hernandez instructed Officers Hart and Nunez to arrest § 87(2)(b) [REDACTED] transport him to the stationhouse and issue summonses. According to PO Hart, he instructed § 87(2)(b) [REDACTED] to place his hands behind his back, but he refused. PO Hart then grabbed § 87(2)(b) [REDACTED]'s arm, but § 87(2)(b) [REDACTED] flailed his arms. PO Nunez then grabbed § 87(2)(b) [REDACTED]'s other arm and the two officers attempted to place § 87(2)(b) [REDACTED]'s arms behind his back. As § 87(2)(b) [REDACTED] moved his body to prevent the officers from handcuffing him, the three men struggled towards the middle of the sidewalk. The two officers eventually handcuffed § 87(2)(b) [REDACTED] and they escorted him to their police vehicle, but § 87(2)(b) [REDACTED] wrapped his legs around the doorframe of the vehicle. PO Hart stated that he grabbed § 87(2)(b) [REDACTED]'s legs and pushed them inside his vehicle. According to PO Hart, during the five-minute struggle, § 87(2)(b) [REDACTED] screamed causing a crowd to gather. § 87(2)(b) [REDACTED] asked the crowd to call Internal Affairs. Because a crowd had gathered and safety issues were a concern, the officers decided to search § 87(2)(b) [REDACTED] at the parking lot of the stationhouse. The officers transported § 87(2)(b) [REDACTED] to the 34th Precinct stationhouse without further incident. § 87(2)(b) [REDACTED] did not complain about having sustained injuries, and PO Hart did not observe any injuries on him. PO Hart stated that no officer frisked § 87(2)(b) [REDACTED] during the street encounter.

PO Hart denied punching, kicking or kneeling § 87(2)(b) [REDACTED] during the incident and added that he did not observe the other two officers commit the above acts. According to PO Hart, Sgt. Hernandez did not assist with the physical apprehension of § 87(2)(b) [REDACTED]. PO Hart denied that he threatened § 87(2)(b) [REDACTED] with the use of force (slap comment). (See enclosure #12A-F)

Sgt. Juan Hernandez

Sgt. Hernandez was interviewed at the CCRB on April 5, 2005. His memo book entry indicates, "One under by PO Hart."

§ 87(2)(g) [REDACTED] Sgt. Hernandez admitted that he authorized the stop and arrest of § 87(2)(b) [REDACTED] saying that the officers were patrolling the area because it is burglary prone and when they approached § 87(2)(b) [REDACTED] and § 87(2)(b) [REDACTED] they simply wanted to determine the males' residence and then instruct them to move from the entrance. Additionally, Sgt. Hernandez stated that under his supervision, Officers Hart and Nunez arrested § 87(2)(b) [REDACTED] to transport him to the 34th Precinct stationhouse to verify his identification and issue him a summons. According to Sgt. Hernandez, when Officers Hart and Nunez physically struggled with § 87(2)(b) [REDACTED] attempting to effect his arrest, the two officers placed § 87(2)(b) [REDACTED] face-first against a parked vehicle to gain leverage, and then handcuffed him. Additionally, Sgt. Hernandez did not indicate that PO Hart grabbed § 87(2)(b) [REDACTED]'s leg as the officer attempted to place him inside the police vehicle. Sgt. Hernandez stated that he did not observe the officers punch, kick or knee § 87(2)(b) [REDACTED] during the struggle. Sgt. Hernandez stated that he stood beside

Officers Hart and Nunez during the incident, and he did not hear PO Hart threaten § 87(2)(b) with the use of force. (See enclosure #13A-D)

PO Fabio Nunez

PO Nunez was interviewed at the CCRB on April 5, 2005. He did not prepare memo book entries regarding this incident.

§ 87(2)(g) When Officers Hart and Nunez attempted to place § 87(2)(b) inside their police vehicle, PO Hart stated that he grabbed § 87(2)(b)'s leg, but PO Nunez did not describe this act. PO Nunez stated that no officer punched, kicked or kned § 87(2)(b) during the incident and that he did not hear PO Hart threaten § 87(2)(b) with the use of force. (See enclosure #14A-E)

On-Line Booking Arrest Report - § 87(2)(b)

The above report was prepared by PO Hart on December 31, 2005. The narrative of the report indicates, "At t/p/o defendant was observed blocking entrance of above location and did refuse to move at police officer's orders. Defendant furthermore did refuse to get handcuffed flailing his hands and yelling police brutality creating a crowd and causing public alarm." The report also indicates that § 87(2)(b) was arrested for § 87(2)(b). According to the report, PO Hart indicated that physical force was used to restrain/control/remove § 87(2)(b) (See enclosure #15A-C)

§ 87(2)(b)) [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Summons Disposition - § 87(2)(b)

§ 87(2)(b)) [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Officer Substantiation History

Neither Sgt. Hernandez nor Officers Hart and Nunez have CCRB complaints filed against them in which the Board substantiated allegations.

Conclusions and Recommendations

Undisputed Facts

That Sgt. Hernandez authorized the stop and question of § 87(2)(b) and § 87(2)(b) is not in dispute. That Officers Hart and Nunez used physical force to effect § 87(2)(b)'s arrest is also not at issue. The three officers corroborated the above.

Issues in Dispute

§ 87(2)(g)

Credibility Assessment

§ 87(2)(g)

§ 87(2)(g)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Allegation A: Sgt. Juan Hernandez authorized the stop and question of § 87(2)(b) and § 87(2)(b) in violation of Patrol Guide Procedure 212-11.

§ 87(2)(b) stated that he stood at the entrance of the building and that he did not possess identification during the incident. § 87(2)(g)

[REDACTED]

According to section 240.30, “A person is guilty of disorderly conduct when, with intent to cause public inconvenience, he obstructs pedestrian traffic [or] congregates with other persons in a public place and refuses to comply with a lawful order to disperse” (See enclosure #1). § 87(2)(g) Patrol Guide 212-11, which states, “When a member of the service reasonably suspects a person has committed, is committing or is about to commit a Penal Law misdemeanor, [he should] stop person and request

identification and explanation of conduct” (See enclosure #2). § 87(2)(g)

Allegation B: PO Harvin Hart used physical force against § 87(2)(b) in violation of Patrol Guide Procedure 203-11.

Allegation C: PO Fabio Nunez used physical force against § 87(2)(b) § 87(2)(b) in violation of Patrol Guide Procedure 203-11.

§ 87(2)(g)

. Patrol Guide procedure 203-11 directs officers when effecting an arrest to use “only that amount of force necessary to overcome resistance.”

In PD v. Pusateri, OATH Index No. 1919/99 (Dec. 7, 1999) the Administrative Law Judge held that “Even if [his] account were accurate, given the circumstances of his refusal to leave and his aggressive posture, such force would not be excessive. The evidence suggests that the force employed by the respondent[s] was not gratuitous. [Moreover] sufferance of an injury...while failing to cooperate during an arrest is not unusual and, absent other credible evidence, does not demonstrate that excessive force was employed.”

In Police Department v. Torres, OATH Index No. 994/91, the ALJ noted that “resistance to an arrest raises the threshold level of reasonable force which may be used to effectuate it.” Similarly, in Transit Authority v. Godas, Lively & Palumbo, OATH Index No. 1357-59/90, the hearing judge held that “resistance to an arrest plainly raises the level of force that is reasonable to effect the arrest.” In PD v. Teeter, a case with a similar fact pattern, the Administrative Law Judge found that, “in this instance, [the complainant] acknowledged that [s]he offered certain physical resistance to [the officer’s] attempts to handcuff him. Indeed, given [the complainant]’s own acknowledged anger at what [s]he felt was an unjustified stop and arrest, I was convinced that he struggled with [the officer] to prevent his handcuffing even more than [s]he admitted, and as [more than the officer] described.

§ 87(2)(g)

Investigator:

Date:

Supervisor:

Date:

Reviewed by:

Date:

Reviewed by:

Date: